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Supreme Court of the United States

MYLES TAMASHIRO, WARREN TOYAMA, HEATHER FARMER, FILO TU, JEANETTE TU, LYNN MISAKI, CLYDE OTA, MIRIAM ONOMURA, and YOSHIKO NISHIHARA,

Petitioners,

v.

DEPARTMENT OF HUMAN SERVICES, STATE OF HAWAI'I, STEVEN TEETER, JOE CORDOVA, DAVE EVELAND, LILLIAN B. KOLLER, and CITY AND COUNTY OF HONOLULU,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

BRIEF OF *AMICI CURIAE* RANDOLPH-SHEPPARD VENDORS OF AMERICA, AMERICAN COUNCIL OF THE BLIND, AND NATIONAL EDUCATION AND LEGAL DEFENSE SERVICES FOR THE BLIND SUPPORTING PETITIONERS

ROBERT R. HUMPHREYS, ESQ.
Counsel of Record
4319 Reno Road, N.W.
Washington, D.C. 20008-4221
Telephone: 202-363-2200
Attorney for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*[1]

The Randolph-Sheppard Vendors of America ("RSVA") is the largest national not-for-profit membership organization of and for blind vendors licensed by states to operate vending facilities on federal property pursuant to the federal Randolph-Sheppard Act, 20 U.S.C. §§107-107f, as well as blind vendors licensed by states to operate vending facilities on non-federal property pursuant to the varied laws of each state. RSVA was established to represent the interests of blind vendors throughout the country in matters of direct importance to the vendors' livelihood, including litigation such as that before the Court. RSVA provides a forum for the exchange of ideas and information, and is organized to promote and advance the blind vending facility program on both state and national levels.

The American Council of the Blind (ACB) is a national not-for-profit organization of individuals who are blind and severely visually impaired. ACB's functions and purposes are many, including advocacy for people who are blind. Chapters of the organization are located in most States, including Hawai'i.

National Education and Legal Defense Services for the Blind (NELDS) is a national nonprofit organization established to assist blind and visually impaired persons

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[1] Letters from petitioners and respondents indicating their consent to the filing of this *amici curiae* brief have been filed with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part. Counsel for *amici curiae* provided expert testimony for petitioners regarding this matter at an earlier stage of this litigation. No person or entity other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

and organizations to advocate for and to preserve rights for the blind under the law. NELDS has a deep interest in the instant litigation because it involves issues that may impact nationally on the employment of blind persons, including the rights of such persons to pursue remedies for their grievances against States that violate the law.

This case has profound implications for the employment opportunities of blind people in Hawai'i and throughout the nation. *Amici* have a direct interest in the outcome of the case, in that it affects the entire Randolph-Sheppard Act remedial process. If the decision of the Supreme Court of Hawai'i is allowed to stand, blind vendors seeking to redress their state law grievances against State licensing agencies about conduct not governed by the Randolph-Sheppard Act itself will be forced to engage in onerous federal arbitrations instead of pursuing existing state-based remedies through State courts.

A decision by this Court not to grant review would further weaken the ability of blind vendors to protect their property and employment rights and the ability of blind vending facility programs in the several States to provide additional remedies to their citizens. Existing State laws permitting a two-track system of grievance resolution – federally-based and State-based – are preempted under the Hawai'i Supreme Court's ruling, thus depriving blind vendors of an alternative method of dispute resolution available to other state citizens. The Hawai'i court's result thereby imposes irrational discrimination against the State's licensed blind vendors.

REASONS FOR GRANTING THE PETITION

The Court should grant the Petition and consider this case because the Supreme Court of the State of Hawai'i has disturbed the balance between federal and state law and jurisdiction, has wrongly interpreted federal law, federal regulations, and the preamble to the federal regulations governing the blind vending facility program, and has, contrary to a consistent body of authority, ceded to a federal agency and federal courts exclusive jurisdiction over an issue of state law relating to blind vendors operating on state property. The Hawai'i decision, if allowed to stand, will upend state laws and processes involving the blind vending facility program across the Nation, will jeopardize the Petitioners' very rights to have their grievances resolved, and will result in an entirely novel interpretation of state sovereign immunity.

As confirmed in the Petition for Writ of Certiorari, supported in all respects by *amici*, the opinion likewise rejects the correct alternative adjudication paths utilized in many other states, as well as decisions in the First and Federal Circuits. The dissent in *Tamashiro, et al. v. Dep't of Human Svcs., et al.*, 146 P. 3d 103 (Haw. 2006), correctly reflects all existing authority, whether in the federal statute and its history, in federal administrative interpretation, or in federal court decisions. The Hawai'i Supreme Court's opinion will upend the laws of many states, weaken the administrative and interpretative authority of the federal agency charged with preservation of the federal blind vendor law's purpose, and disrupt the federal arbitration process under the Randolph-Sheppard Act.

SUMMARY OF ARGUMENT

Blind vendors throughout the Nation, as well as those in Hawai'i, will be irreparably injured as a result of the State Supreme Court's decision in *Tamashiro*. Since the federal government pays the cost of Randolph-Sheppard arbitrations, additional costs will be imposed needlessly on the federal government, and the glut of additional state cases will paralyze the system, or at the very least will seriously delay resolution of blind vendor grievances as well as those brought by States against federal property managing agencies, for which the federal law provides, using the same arbitration processes.

The effect of the decision below will be chaotic because it denies blind vendors in Hawai'i rights of recourse available to all other citizens of the State, and will nullify a prior Hawai'i Supreme Court decision recognizing state jurisdiction over state matters, and blind adults and children, including several blind vendors, will lose jobs and resources.

Congress did not intend, and the law does not contemplate, that federal arbitration and appeal to federal district courts are the sole sources of remedy for blind vendors aggrieved by the action of State licensing agencies. No court, either federal or state, has so held. The agency charged by Congress with the responsibility of interpreting the Randolph-Sheppard Act and administering the blind vending facility program, the Rehabilitation Services Administration, U.S. Department of Education, has never issued any policy rejecting or counseling against the use of state laws that provide alternative dispute resolution through state courts with respect to blind vendors grieving a state matter. The Secretary of Education, through

the Rehabilitation Services Administration, has convened arbitrations with respect to matters that involve state property and therefore state law, but that fact does not give the Hawai'i Supreme Court license to *require* a blind vendor whose dispute is limited to state law and state property to file for arbitration with the U.S. Education Secretary.

ARGUMENT

A. The Decision Below, If Not Reversed By This Court, Will Harm Blind Vendors And State Licensing Agencies Nationally And Will Overburden The Federal Agency Responsible For Blind Vendor Arbitrations.

The Supreme Court of Hawai'i improperly held that the U.S. Department of Education's Rehabilitation Services Administration has exclusive jurisdiction over blind vendor claims of every sort, without regard to whether the subject matter relates to the federal properties governed by the Randolph-Sheppard Act.

The Rehabilitation Services Administration lacks the financial and human resources to accept that expansion of jurisdiction. Funding for arbitrations is provided from the Salaries and Expenses budget of the Department of Education, at a level of approximately $300,000 per year. With respect to the availability of human resources, the entire Randolph-Sheppard program staff devoted to such arbitrations is comprised of one professional employee and part of the time of one clerical employee. By law, the Department of Education must pay all reasonable costs of Randolph-Sheppard arbitrations. *See* 20 U.S.C. §107d-2.

The decision will increase the time the Department of Education requires to process and complete blind vendor complaints. Currently, many causes of action dealing with state violations of state law under the various blind vendor programs are dealt with through state courts. *See* discussion of various state laws providing for the handling of these cases in Petition for Writ of Certiorari, *passim*. Should all these cases be forced into the federal arbitration process, the existing system would be unable to handle the glut of complaints, resulting in both extensive delays (arbitrations now consume approximately 18 months of time, on average) and greatly increased costs, which the Department may not be prepared to absorb.

In addition to the time and costs of arbitrations, there is no assurance that federally-appointed arbitrators will properly interpret State laws. The Hawai'i Supreme Court decision in this case diverts State cases from consideration by the expert decision-makers – State courts. At the same time, the challenges imposed on arbitrators in adjudicating a variety of state vending program laws may significantly increase the time and cost of arbitrations, and the result of errors in decisions could hurt blind vendors.

Moreover, the result of the decision, if allowed to stand, will be to injure State licensing agencies because it would deprive each State of the power to create additional or alternative remedies. Similarly, it will injure blind vendors throughout the country by limiting their right to redress grievances against state violations of state law in such alternate forums. It will glut the federal arbitration process by requiring all blind vendors to address all their grievances, state or federal, through federal arbitration. Such an eventuality will further delay the final prosecution of blind vendor grievances, and in many cases will be

permanently discouraged from seeking redress because of a lack of resources to do so.

B. The Decision Below Throws The Hawai'i Blind Vending Program Into Chaos By Denying Blind Vendors The Remedies Available To All Other Citizens of Hawai'i.

By holding that the federal law preempts State law, the Hawai'i Supreme Court eliminates the application of an existing statute that benefits all citizens of Hawai'i. State law plainly grants jurisdiction over "[a]ll claims against the State founded upon any statute of the State to the circuit courts of the State." Haw. Rev. Stats. §661-1. That is precisely the path that was taken by the Petitioners in prosecuting their case against the Respondents. In addition, Haw. Rev. Stats. §603-21.5 grants the circuit courts subject matter jurisdiction over all civil causes of action "unless precluded by the State Constitution or by statute." Dissenting Opinion, *Tamashiro, et al. v. Department of Human Services, State of Hawai'i, et al.*, 146 P. 3d 103, 141 (Haw. 2006), citing *Sherman v. Sawyer*, 621 P. 2d 346, at 348-49. In one fell swoop, by abdicating jurisdiction over the blind vendors' claims, the majority in *Tamashiro* nullifies the State laws cited *supra* as they apply to blind vendors.

What is more, the *Tamashiro* decision discriminates against the blind vendors of the State because it will prevent such vendors from using the state adjudicative process under Chapter 91, Hawai'i Revised Statutes. Chapter 91, the administrative procedure law of the State, provides for judicial relief through the circuit courts for persons aggrieved by an agency ruling or decision in a contested case. No other class of citizen in the State is

denied access to State administrative review and the State courts.

By allowing the State to violate Hawai'i law, the State Supreme Court will visit substantial injury upon the blind vendors. By its two-decade-long failure to enforce its own law, the Respondent Department of Human Services squandered millions of dollars that properly belonged to the blind vendors, to be used for their retirement and health benefits, and jeopardized the integrity of the Randolph-Sheppard Revolving Account established by Haw. Rev. Stat. §347-12.5. The Circuit Court awarded the blind vendors equitable relief that included requirements that the Respondent hire a vending machine specialist to ensure full payment of all vending income due to the trust fund; that it hire a trust fund investment advisor to husband the vendors' resources; that the State submit quarterly and annual financial reports on the fund; that it develop a ten-year plan for program development; that it develop a retirement and health care plan for the blind vendors, including benefits for retired vendors. All these benefits ordered by the trial court will be lost to the blind vendors if the Hawai'i Court's decision is upheld, and current and past blind vendors will suffer both physically and financially as a result.

The Hawai'i decision overrules its own prior opinion which properly and correctly determined that the court has subject matter jurisdiction over a blind vendor case involving state law and the Honolulu International Airport. There can be no doubt that these State-based remedies exist under current law, since in a prior case, *Hawai'i Blind Vendors Association v. Department of Human Services*, 791 P. 2d 1261 (Haw. 1990), the Hawai'i Supreme Court accepted subject matter jurisdiction, ruled in favor

of the blind vendors, and determined that Maka'ala, a nonprofit corporation serving persons with disabilities other than blindness, had improperly operated vending facilities at the Honolulu International Airport. The court found that under Haw. Rev. Stat. §102-14, blind vendors held a priority to operate such facilities. The *Tamashiro* case will throw the Hawai'i blind vending facility program into chaos.

In the wake of the 1990 decision several blind vendors were employed at the airport, and pursuant to a settlement agreement a substantial portion of the net income of the several vendors, collectively called Blind Vendors Ohana, is provided to the state's Randolph-Sheppard trust fund to pay for the blind vendors' retirement, health insurance, management services, and vending facility equipment purchase and repair. Another portion is donated to a nonprofit foundation, which helps fund the library for the blind, supports rehabilitation of blind people, and provides resources for the education of blind children. The amount provided to the blind vending program helps defray the cost of equipment and equipment repair for blind vending facility operations. Unless the *Tamashiro* decision is overturned, the entire airport operation could be dismantled, resulting in the loss of a number of jobs and resources for blind adults and children.

C. The Hawai'i Supreme Court Majority Misread The Federal Randolph-Sheppard Act And Its Decision Is Contrary To The Act's Congressional Purpose.

The Hawai'i Supreme Court has by its decision in *Tamashiro* found preempted state law authorizing administrative and court review for blind vendors and other

citizens and has ceded to a federal process exclusive jurisdiction on a matter involving non-federal property and state law. It has violated the Constitution of the United States by unilaterally abdicating Hawai'i's waiver of sovereign immunity.

The Randolph-Sheppard Act was established by the Congress to ensure the placement of vending facilities on all federal property, wherever feasible, by creating a priority for such facilities on such property. Federal property managing agencies may not limit the placement or operation of vending facilities without the approval of the United States Secretary of Education. *See* 20 U.S.C. §107(a) and (b). Although the Congress expected that State licensing agencies operating blind vending facility programs would maintain a single program that includes federal, state, county, municipal, and private vending facilities, it did not address, nor did it contemplate, the question of an "adjudication path" for controversies dealing with non-federal facilities. Certainly, it did not mandate the use of evidentiary hearings, arbitrations, and appeals to federal courts for any non-federal issue.

The federal Randolph-Sheppard Act does not require the use of its arbitration provisions for any matter other than that concerning federal property. 20 U.S.C. §§107d-1 and 107d-2.

The agency of the federal government charged by Congress with interpreting and administering the Randolph-Sheppard Act, the Department of Education and its Rehabilitation Services Administration (RSA), developed regulations in accordance with the requirements of

the Act and the 1974 amendments thereto. [2] The preamble to the implementing regulations specifically addressed the question of whether the federal agency could establish common procedures and requirements to cover blind vendors located on federal property and those operating on other property by recommending that common procedures be adopted, but RSA did not believe it had the authority to mandate such procedures. It noted that hearing procedures for vendor complaints had been established in many states prior to the enactment of the 1974 amendments, and there was no need to impose separate procedures for vendors on federal property. *See* Preamble, 45 C.F.R. Part 1369, 42 Fed. Reg. 15802, 15803 (March 23, 1977).

The 1974 regulations themselves require State licensing agencies to specify in writing and maintain procedures for full evidentiary hearings to each blind vendor "dissatisfied with any State licensing agency action arising from the operation or administration of the vending facility program," and allow a blind vendor to file an arbitration complaint with the U.S. Secretary of Education when the vendor is dissatisfied with the results of an evidentiary hearing. 34 C.F.R. §395.13(a). Nothing in the regulations prohibits the use of alternative methods of dispute resolution, however, including access to state administrative processes and state courts. Because the Randolph-Sheppard

[2] Counsel of record for *amici* was appointed Commissioner of the Rehabilitation Services Administration in the year those regulations were developed and promulgated. Prior to his appointment as Commissioner, he had been special counsel to the U.S. Senate Committee on Labor and Public Welfare, where he was chief legislative adviser on disability matters to Senator Jennings Randolph, for whom the Randolph-Sheppard Act is named, and was responsible for drafting the Randolph-Sheppard Act Amendments of 1974 and other legislation.

Act, by its terms, applies only to federal property, federal regulations could not impose any limitation on the use of state courts to resolve vendor disputes on state or other property, including private property.

Certainly, Congress in 1974 intended to encourage the employment of blind persons in all venues, not just on federal property. Indeed, the congressional findings preceding the 1974 amendments recognized that the potential existed for doubling the number of blind vending facilities on federal and other property within five years of enactment, and Congress adopted the legislation in part to accomplish that objective. *See* section 201, Pub. L. 93-516.

However, State law, when adopted – not federal law – governs the operation of the blind vending program and facilities on state, county, municipal, and private property. Hawai'i has adopted such statutes for this purpose, just as have many other states. Haw. Rev. Stats. §102-14; Haw. Rev. Stats. §347-12.5. The first-cited law, termed Hawai'i's "little Randolph-Sheppard Act," provides authority for the operation of the blind vending facility program property other than federal property. It gives exclusive authority to the State licensing agency to provide vending machines and receive all income from machines in state and county buildings and other property. The second law sets forth the purposes for which income from vending machines on state, city and county property is to be utilized. Nowhere in either law does there appear a requirement that an aggrieved blind vendor follow the so-called "federal adjudication path" to resolve his or her grievance, and the Hawai'i Supreme Court did not, and could not, rely upon State law to reach its erroneous conclusion.

CONCLUSION

For all the foregoing reasons, *amici curiae* Randolph-Sheppard Vendors of America, American Council of the Blind, and National Education and Legal Defense Services for the Blind respectfully assert to this Court that the Petition for Writ of Certiorari submitted by the Petitioners in this case should be granted.

Respectfully submitted,

ROBERT R. HUMPHREYS
Counsel of Record
Attorney at Law
4319 Reno Road, N.W.
Washington, D.C. 20008
(202) 363-2200
Counsel for Amici Curiae

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